IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

FRIDAY, THE 20TH JULY 2007 / 29TH ASHADHA 1929

WP(C).No. 31708 of 2005(Y)

OS.1054/2002 of ADDL.MUNSIFF COURT,CHERTHALA

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PETITIONER:

KERALA STATE CO-OPERATIVE BANK LTD.,
ALLEPPEY, REPRESENTED BY ITS MANAGER.

BY ADV. SRI.NAGARAJ NARAYANAN,SC,K.S.CO-OP BANK

RESPONDENTS:

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1. **UDAYASENAN, SON OF RAJEEVAN,**
   KUREEKATHARAYIL, KOKKOTHAMANGALAM,
   SHERTALLAI.

2. **MANUAL SHAJI,**
   SON OF ANTONY,
   MATTATHIL HOUSE, CHERTHALA NORTH,
   SHERTALLAI.

BY ADV. SRI.SOORAJ.T. ELANJICKAL for R2
SRI.V.K.PRAVEEN for R1

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 20/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.NO.31708/2005 Y

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: **COPY OF THE AGREEMENT NO.ABR/32/NLS/2334/99-2000 DTD. 18/03/2000.**

EXT.P2; **COPY OF THE NOTICE DTD. 30/11/2004 WITH ANNEXURES.**

EXT.P3; **COPY OF THE NOTICE AND COPY OF PETITION IN I.P.1 OF 2005 OF THE SUB COURT OF SHERTALLAI DTD. 7/03/2005.**

EXT.P4; **COPY OF THE AFFIDAVIT AND PETITION DTD. JULY, 2005 IN O.S.1054 OF 2002 OF THE MUNSIFF COURT OF SHERTALLAI.**

EXT.P5: **COPY OF THE ORDER IN I.A.2267 OF 2005 IN O.S.1054 OF 2002 DTD. 27/07/2005 OF THE ADDL.MUNSIFF COURT OF SHERTALLAI.**

EXT.P6; **COPY OF THE ORDER INI.A.2268 OF 2005 IN O.S.1054 OF 2002 DTD. 28/10/2005 OF THE ADDL.MUNSIFF COURTOF SHERTALLAI.**

/TRUE COPY/

P.A.TO JUDGE

KSS

PIUS C. KURIAKOSE, J.

W.P.(C) NO. 31708 of 2005

Dated this the 20th day of July , 2007

The Kerala State Co-operative Bank Ltd. has filed this Writ Petition under Article 227 of the Constitution impugning Ext.P6 order passed by the Additional Munsiff, Cherthala dismissing an application filed by the petitioner under Order XXI Rule 90 C.P.C. for setting aside sale of the suit schedule property in favour of the 1st respondent who was the plaintiff in the suit. The suit was instituted by the 1st respondent against the 2nd respondent, the defendant therein for a decree of specific performance of an agreement for sale between the plaintiff and the defendants dated 7.8.2002 in respect of the suit property. The suit was decreed ex parte and the 2nd respondent was directed to execute and register the sale deed on receipt of the balance sale consideration. The 2nd respondent did not choose to file any application for rescinding the contract and the trial court allowed an application filed by the 1st respondent under Section 28(3) of

the Specific Relief Act for the execution of the registration of the sale deed and accordingly a sale deed in respect of the property was executed and registered through the process of the court representing the interest of the 2nd respondent. The instant application for setting aside the sale was filed by the petitioner-Bank only when the order of delivery was passed on an execution petition filed by the 1st respondent. The case of the petitioner-Bank is that the property in question stood equitably mortgaged in favour of the Bank by the 2nd respondent for a loan of Rs.4 lakhs availed by him from the Bank. The 2nd respondent defaulted repayment and accordingly the loan account was classified as NPA by the Bank and the liability of the 2nd respondent as on 31.3.2004 was Rs.8,01,766/-. Repossession notice under Section 13(2) of the Securitisation and Reconstruction of the Financial Assets and Enforcement of Security Interest Act, 2002 was issued and published by the Bank on 10.4.2004 and the Bank took possession of the property on 30.11.2004. The Bank relies on Ext.P2 in this regard. According to the Bank, it did not have any information regarding the filing of the suit or regarding obtainment of the ex parte decree by the first respondent against

the 2nd respondent. The Bank came to have information regarding the proceedings in the suit filed by the 1st respondent as O.S.No.1054/02 only on 17.6.2005 while it receiving notice from the insolvency court regarding the insolvency petition filed by the 2nd respondent on 17.6.2005. On coming to know about the sale and the order of delivery the Bank filed Ext.P4 application under Order XXI Rule 90. Separate application for stay Ext.P5 was also filed. The court below has passed Ext.P6 order rejecting Ext.P4 application, however, permitting the Bank to get itself impleaded on the original side and to do the needful to have the decree cancelled. It is Ext.Py which is impugned in this Writ Petition.

2. I have heard the submissions of Mr.Nagaraj Narayanan, learned counsel for the petitioner-Bank and also those of Mr.V.K.Praveen, counsel for the 1st respondent. Though the name of Mr.Sooraj Elanjickal is shown in the cause list as counsel appearing for the 2nd respondent, the learned counsel would submit that he does not appear for the 2nd respondent who is already served with notice.

3. Sri.Nagaraj Narayan, the learned Counsel for the petitioner would submit that the agreement for sale relied on

by the first respondent/plaintiff for instituting the suit against the 2nd respondent/ judgment debtor and the decree obtained by the first respondent against the 2nd respondent are the results of fraud and collusion perpetrated by the two respondents on the petitioner bank and also the court itself. The unregistered agreement for sale written on stamp paper dated 7.8.2000 is seen executed years after the mortgage in favour of the bank. The agreement is in violation of the terms of the mortgage and is obviously during the subsistence of the mortgage and can only be subject to the mortgage. The subsistence of the mortgage was a fact well known to the respondents 1 and 2 and they only colluded together between themselves for defeating the interest of the bank over the property and this was why the 2nd respondent allowed the ex parte decree to be passed against him in the suit filed by the first respondent. Fraud is apparent on the face of the record and a decree obtained by play of fraud is a nullity and nonest in the eyes of law. A decree which is a nullity on account of having been obtained by play of fraud can be challenged in any court even in collateral proceedings. Counsel submitted that possession of the properties have been taken by

the Bank under Section 13 (4) of the Securitisation Act and that by virtue of Section 13(6) the property vested in the Bank and that proceedings under the Securitisation Act will have overriding effect. The learned counsel invited my attention to Section 34 of the Securitisation Act and submitted that the jurisdiction of the Civil Court is ousted in respect of the proceedings under the Securitisation Act. The learned Munsiff's view that the suit was instituted prior to 30.11.2004 the date of taking possession under the Securitisation Act and that possession was taken in violation of the order of injunction order against the alienation passed on 28.11.2002 is totally unreasonable according to the counsel.

4. The learned counsel for the 2nd respondent, the decree holder before the court below would submit that the allegations of collusion between the two respondents are absolutely unfounded. The first respondent is a bona fide purchaser for value. He did not have any notice whatever regarding the interest which the bank is claiming over the property. The application submitted by the petitioner under Order 21 Rule 90 was clearly not maintainable in law and, therefore, this court will

not be justified under Article 227 in interfering with the order dismissing that application.

5. Collusion and fraud in judicial proceedings have always been deprecated by courts. Non disclosure of a vital information or of vital documents containing vital information with a view obtain an advantage to one or more parties to the litigation according the Supreme Court will amount to play of fraud on the court. (See the judgment of the Supreme Court in **S.P.Chengalvaraya Naidu (dead) by Lrs. v. Jagannath (Dead) by Lrs. and others (1994 (1) SCC Cases)**. Unholy alliance between one or more parties to the litigation with the objective of defrauding another, who may or may not be a party to the litigation, or with the objective of obtaining unmerited gain or to achieve an unlawful goal is collusion. In the instant case, the case of the petitioner's bank that the decree obtained by the first respondent is vitiated by fraud and also by collusion between the respondents 1 and 2, certainly merits consideration when the circumstances under which the decree is obtained and the circumstance that the material fact of the first respondent having executed an equitable mortgage over the suit

property prior to the suit agreement for sale was suppressed from the court are taken into account.

6. The learned Munsiff also does not under the impugned order hold that the decree or the sale in favour of the first respondent are not vitiated by fraud or collusion. Ultimately what the learned Munsiff has done is to relegate the petitioner to the original sides to file an application for setting aside the decree and the consequent sale on available grounds after getting itself impleaded as a party. The above decision of the learned Munsiff cannot be found to be faulty. Though it may be possible for a person to contend even in execution proceedings that a decree is nullity being vitiated by fraud, it will not proper to blame the learned Munsiff in this case where the application filed by the petitioner bank was under Rule 90 of order 21 CPC for setting aside the sale. Order 21 Rule 90 cannot have any application in a case like the present one where the sale is not conducted by the Execution Court but the sale was conducted by the trial court itself, on the basis of an application under Section 28(3) of the Specific Relief Act. Rule 90 of order 21 relates only to applications for setting aside execution sales on

the ground that there has been fraud or material irregularities in the matter of publication regarding execution sales or the conduct of the sale by execution court under Rule 64 to Rule 87 of Order 21. At any rate it is not possible to hold that the direction under the impugned order to the petitioner bank to move the original side is vitiated to the extent of justifying interference by this court under the supervisory jurisdiction. At the same time it will be noticed that the view of the learned Munsiff that the possession assumed by the Bank under Section 13 (4) of the Securitisation Act cannot be of any consequence since the same is during the subsistence of an injunction order passed in favour of the first respondent does not appear to be correct. If the order of injunction is ultimately shown to be the result of a collusion between the respondents inter se the arguments that the same is nonest in the eyes of law liable to be ignored by all the concerned will become meritorious. Moreover, the injunction order in question only restrained alienation of the property by the first respondent to any stranger and the case of the petitioner bank is that long prior to the injunction order there is already a mortgage of the property and therefore the

subsequent order of injunction cannot have any effect on the interest which the bank had already acquired over the property as a mortgagee. The overriding effect of the provisions of the Securitisation Act and the ouster of the civil court's jurisdiction are matters which will be considered by the trial court when the same is moved by the petitioner with an appropriate application. I dispose of the writ petition issuing the following directions:

7. The petitioner is directed to file an application before the trial court seeking to set aside the decree and the consequent sale on grounds of fraud and collusion and all other available grounds including the grounds based on the provisions of the Securitisation Act. If such an application is filed by the petitioner within three weeks of their receiving a copy of this judgment, the trial court will exclude the time during which this writ petition is pending before this court and the time till the filing of the application for the purpose of Section 14 of the Indian Limitation Act from the reckoning. The order of stay presently passed will continue for two more months from today. The trial court will dispose of the application to be filed by the petitioner on merit of the contentions raised by the parties. It

is made clear that the trial court does not have to be unduly influenced by any of the observations contained herein regarding the allegations of fraud and collusion levelled by the petitioner against the respondents and will be free to take a decision on the basis of the evidence which comes on record and in accordance with law.

PIUS C. KURIAKOSE,
JUDGE.

srd/dpk